

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON

JAMES DALE DUNCAN,

Petitioner,

v.

Case No. 2:08-cv-01220

DAVID BALLARD, Warden,  
Mount Olive Correctional Complex,

Respondent.

PROPOSED FINDINGS AND RECOMMENDATION

This is an action for habeas corpus relief, filed pursuant to the provisions of 28 U.S.C. § 2254. Pro se Petitioner, James D. Duncan, is incarcerated at Mount Olive Correctional Complex. This case was referred to this United States Magistrate Judge by standing order to consider the pleadings and evidence, and to submit proposed findings and a recommendation for disposition, all pursuant to 28 U.S.C. § 636(b)(1)(B).

This is at least the third petition for a writ of habeas corpus pursuant to § 2254 filed by this petitioner in this court. His first petition, Duncan v. Coleman, No. 2:02-cv-0432 (S.D. W. Va. June 24, 2002) (Goodwin, J.), was dismissed for failure to exhaust state remedies. His second petition, Duncan v. McBride, No. 2:02-cv-1352 (S.D. W. Va. March 2, 2004) (Copenhaver, J.), was dismissed because it was time-barred. He filed a third case, Duncan v. Ballard, No. 2:08-cv-1130, in which he attempted to

appeal from an order entered by the Supreme Court of Appeals of West Virginia. A Proposed Findings and Recommendation to dismiss is pending before Judge Faber.

Pursuant to Rule 4 of the Rules Governing Section 2254 Proceedings in the United States District Courts, "[i]f it plainly appears . . . that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified."

Rule 9, Rules Governing Section 2254 Proceedings, provides that "[b]efore presenting a second or successive petition, the petitioner must obtain an order from the appropriate court of appeals authorizing the district court to consider the petition as required by 28 U.S.C. § 2244(b)(3) and (4)." Petitioner has not obtained such an order from the United States Court of Appeals for the Fourth Circuit.

The undersigned proposes that the presiding District Judge **FIND** that Petitioner's Petition for Writ of Habeas Corpus is a second or successive petition which has not been authorized by the Fourth Circuit. It is hereby respectfully **RECOMMENDED** that the Petition (# 1) be dismissed without prejudice, and this matter removed from the court's docket.

Petitioner is notified that this Proposed Findings and Recommendation is hereby **FILED**, and a copy will be submitted to the Honorable John T. Copenhaver, Jr., United States District Judge.

Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Rules 6(e) and 72(b), Federal Rules of Civil Procedure, Petitioner shall have ten days (filing of objections) and then three days (mailing and service) from the date of filing this Proposed Findings and Recommendation within which to file with the Clerk of this court, specific written objections, identifying the portions of the Proposed Findings and Recommendation to which objection is made, and the basis of such objection. Extension of this time period may be granted for good cause shown.

Failure to file written objections as set forth above shall constitute a waiver of de novo review by the district court and a waiver of appellate review by the circuit court of appeals. Snyder v. Ridenour, 889 F.2d 1363, 1366 (4th Cir. 1989); Thomas v. Arn, 474 U.S. 140, 155 (1985); Wright v. Collins, 766 F.2d 841, 846 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91, 94 (4th Cir. 1984). Copies of such objections shall be served on Judge Copenhaver and this Magistrate Judge.

The Clerk is directed to file this Proposed Findings and Recommendation and to mail a copy of the same to Petitioner.

October 28, 2008  
Date

Mary E. Stanley  
Mary E. Stanley  
United States Magistrate Judge